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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

MALIBU MEDIA, LLC,

Plaintiff,

v.

TIM MCMANUS,

Defendant.

JURY TRIAL DEMANDED

Case No. 2:17-cv-01321-WJM-MF

**PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED
COMPLAINT TO ADD PARTY DEFENDANT AND INCORPORATED
MEMORANDUM OF LAW IN SUPPORT**

Motion Day: April 2, 2018

NO ORAL ARGUMENT REQUESTED

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Plaintiff, Malibu Media, LLC, by and through undersigned counsel and pursuant to Fed. R. Civ. P. 15, hereby respectfully submits this Motion and Incorporated Memorandum in support of its request for Leave to File Second Amended Complaint to Add Party Defendant.

I. INTRODUCTION

This is a copyright infringement case originally against a John Doe Defendant known to Plaintiff only by an IP address. On May 8, 2017, Plaintiff was granted leave to serve a third party subpoena on Defendant's ISP, Optimum Online, to obtain the Defendants' identifying information [CM/ECF 5]. The ISP returned information that the subscriber was a limited liability company named Greenwood Digital, LLC ("Greenwood Digital"). Based on evidence from its investigator, Plaintiff believed that an individual, Tim McManus, who is Partner in Greenwood Digital, and who owns, works, and resides at, the same address as Greenwood Digital, was most likely the natural person committing the infringing acts. Indeed, in the instant case, Plaintiff possesses electronic evidence proving infringement of Plaintiff's works through Greenwood Digital's IP address. Additionally, the subject of the works that Plaintiff's investigators recorded being distributed from the subject IP Address match Defendants' Defendant Tim McManus's interests and professional background. Accordingly, Plaintiff had adequate factual basis to name Tim McManus, and filed its First Amended Complaint on October 19, 2017 [CM/ECF 10].

Thereafter, Defendant McManus filed his Answer and Counterclaims raising an issue as to Plaintiff's naming McManus, and not the subscriber Greenwood Digital, among other defenses and Counterclaims. [CM/ECF 20]. Therefore, Plaintiff has adequate factual basis to additionally name Greenwood Digital, the ISP subscriber, for direct and vicarious copyright infringement, and seeks entry of an order permitting it to do so. *See* Plaintiff's Proposed Second Amended Complaint, attached to Notice of Motion on the instant motion, Exhibit "B."

II. LEGAL STANDARD

Fed. R. Civ. P. 15(a) provides that leave to amend a pleading “shall be freely given when justice so requires.” “[U]nder the liberal pleading philosophy of the federal rules as incorporated in Rule 15(a), an amendment should be allowed whenever there has not been undue delay, bad faith on the part of the plaintiff, or prejudice to the defendant as a result of the delay.” *Adams v. Gould, Inc.*, 739 F.2d 858 * (3d Cir. Pa. 1984). Specifically, as to prejudice, courts “have considered whether allowing an amendment would result in additional discovery, cost, and preparation to defend against new facts or new theories.” *Nesselrotte v. Allegheny Energy, Inc.*, 2007 U.S. Dist. LEXIS 79147 * (W.D. Pa. Oct. 25, 2007).

III. ARGUMENT

A. Plaintiff Has Not Delayed This Case

On May 8, 2017, Plaintiff was granted leave to serve a third party subpoena on Defendant’s ISP, Altice f/k/a Optimum, to obtain the Defendant’s identifying information [CM/ECF 5]. Following the Court’s order, Plaintiff issued the subpoena on Defendant’s ISP or about May 12, 2017. On or about July 6, 2017, Plaintiff received the ISP’s response. Based on available evidence, Plaintiff initially decided to proceed only against Defendant Tim McManus, and filed its Amended Complaint on October 19, 2017 [CM/ECF 10]. Defendant McManus was served with the Amended Complaint on October 25, 2017 [CM/ECF 15]. Defendant initially failed to Answer the Amended Complaint [See Request for Default CM/ECF 16, filed November 30, 2017], but then, on December 8, 2017, appeared via defense counsel and filed a Motion to Vacate the Clerk’s Default [CM/ECF 18]. The default was vacated on January 8, 2018 [CM/ECF 19], and Defendant McManus filed his Answer and Counterclaims on January 8, 2018 [CM/ECF 20]. Based on further factual development, and issues raised by Defendant McManus in his

Counterclaims and in Opposition to Plaintiff's pending Motion to Dismiss the Counterclaims [CM/ECF 22, 25, and 28] Plaintiff is now filing the instant Motion for Leave to File a Second Amended Complaint to name the ISP subscriber, Greenwood Digital, as a second party Defendant. Accordingly, no undue delay exists.

B. No Bad Faith Exists

Plaintiff has a good faith basis to amend its Complaint to name Greenwood Digital as a party Defendant. Indeed, in the instant case, Plaintiff possesses electronic evidence proving infringement of Plaintiff's works through Greenwood Digital's IP address. As set forth on Exhibit A to the Amended Complaint [CM/ECF 10-1], IPP International UG, Plaintiff's investigator, established a TCP/IP connection with a computer using IP address 96.57.99.138. IPP, recorded Greenwood Digital's IP Address engaging in numerous infringing transactions or "hits" of Plaintiff's copyrighted movies from January 21, 2016 through September 14, 2016. Each one of these transactions was recorded in a packet capture ("PCAP") PCAP computer file. Each infringing transaction is also on a MySQL server log file. Each entry on the MySQL log file correlates to a specific PCAP file in IPP's possession. All of the foregoing evidence will be produced during discovery and at trial along with declarations supporting same.

Accordingly, Plaintiff believes it has a good faith basis to name the ISP subscriber, Greenwood Digital, as a party Defendant, pursue its copyright lawsuit, and is in compliance with its duties under Fed. R. Civ. P. 11(b).

C. Defendant Will Not Be Prejudiced

In determining if prejudice exists, courts "have considered whether allowing an amendment would result in additional discovery, cost, and preparation to defend against new facts or new theories." *Nesselrotte v. Allegheny Energy, Inc.*, 2007 U.S. Dist. LEXIS 79147 *

(W.D. Pa. Oct. 25, 2007). Here, discovery has not commenced. And, Plaintiff is not presenting any new facts or theories that Defendant cannot conduct discovery on. Therefore, Defendant will not be prejudiced.

IV. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff leave to file its Second Amended Complaint to name Greenwood Digital, LLC as a party Defendant. See Proposed Order attached to Notice of Motion on the instant motion, Exhibit “C.”

Dated: March 1, 2018

Respectfully submitted,

By: /s/ Patrick J. Cerillo

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all parties through this system.

By: /s/ Patrick J. Cerillo